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In The

Supreme Court of the United States

October Term, 1972

JOHN NUVEEN & CO., INC., a corporation, WILLIAM FEIGELSON, STUART F. SILLOWAY, FRANK P. WENDT, RICHARD J. FRANKE, WALLACE D. FISK, KENNETH R. WAHLBERG, HORACE C. WHITEMAN, INVESTORS SYNDICATE OF AMERICA, INC., a corporation, INVESTORS DIVERSIFIED SERVICES, INC., a corporation, and ALLEGHENY CORPORATION, a corporation,

Petitioners,

vs.

HENRY T. SANDERS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, Henry T. Sanders, individually and on behalf of the class of persons specified in the Complaint, files this Brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The Petitioners have failed to file a certified copy of the Opinion and has failed to file the record below with the Clerk of this Court. Respondent has therefore filed, for the use of the Court, a certified copy of the Opinion and a certified copy of the Joint Appendix which was used in the United States Court of Appeals for the Seventh Circuit. References in this Brief will be to those documents through the following designations: Opinion ("Op."), Joint Appendix ("Jt. App."). No Motion for rehearing in the United States Court of Appeals for the Seventh Circuit was ever presented by the Petitioners.

JURISDICTION.

Respondent does not question the jurisdictional statement set forth in the Petition.

QUESTION PRESENTED.

The Petitioners do not accurately set forth the question presented to and decided by the United States Court of Appeals for the Seventh Circuit. That question is properly framed as follows:

> Whether a broker-dealer who, as principal, sells to the general public unregistered securities in the nature of short term commercial paper is subject to the anti-fraud provisions of the Securities Exchange Act of 1934 in a private action.

STATUTES AND REGULATIONS INVOLVED.

Contrary to Rule 23 of the Rules of this Court, the Petitioners fail to set forth the text of all the statutes and regulations involved in this case, or an accurate citation to those statutes and regulations. Respondent's Complaint, in pertinent part, alleges violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b-5) promulgated thereunder (hereinafter the "anti-fraud provisions"). Petitioners' Motion to Strike raised, as an affirmative defense, the provisions of Section 3(a)(10) of the Securities Exchange Act of 1934. Therefore, construction and application of all three of the foregoing provisions is involved in the Opinion below and in this proceeding. The Petition sets forth only the provisions of Section 3(a)(10) of the Securities Exchange Act of 1934. Respondent takes issue with Petitioners' inclusion verbatim of only one of the statutory provisions involved in the case and the relegation of the other statutory and regulatory provisions to an appendix. In order to correct this omission Respondent sets forth the following statute and regulation which are involved in this matter:

SECURITIES EXCHANGE ACT OF 1934

Section 10. Manipulative And Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

• • • • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 United States Code §78 j (b).

GENERAL RULES AND REGULATIONS OF THE SECURITIES AND EXCHANGE COMMISSION UNDER THE SECURITIES EXCHANGE ACT OF 1934

Rule 10b-5. Employment Of Manipulative And Deceptive Devices

It shall be unlawful for any person, directly, or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 CFR 240. 10b-5.

STATEMENT OF THE CASE.

Petitioners' statement of the case is not substantially correct. An accurate statement follows:

The Complaint in this case was filed on March 12, 1970. It alleges violations of various anti-fraud provisions under federal securities laws. The original Plaintiff, Henry T. Sanders, purchased $35,000.00 of Winter & Hirsch 8 5/8% short term commercial paper dated January 30, 1970. His purchase was made on January 29, 1970.

The Complaint contains three counts, each of which alleges that the Defendants (Petitioners) are responsible to the Plaintiff (Respondent) and to persons similarly situated for certain untrue, false and fraudulent statements of material fact and fraudulent omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. The specific allegations are to be found in paragraph 8, sub-paragraphs A through H of the Complaint (Jt. App. 10-11). The securities in question were sold to the Plaintiff (Respondent) and to the other persons who are members of the Plaintiff class by John Nuveen & Co., Inc. (Petitioners), as principal.

The class pleaded in the Complaint consists of all customers of Petitioners who purchased similar securities and held those securities at the time of the announcement of insolvency of the issuer, Winter & Hirsch, in February, 1970. Those persons are listed in Appendix A to this Brief (see also, Jt. App. 31-32).

The class constitutes at least forty-two purchasers, including the Respondent, owning commercial paper in the aggregate of a minimum of $1,661,500.00 (Op., p. 8). Although some of the paper placed through Nuveen (Petitioners) went to banks, the large majority of purchasers were individuals (Op., p. 8, fn. 18).

On May 18, 1970 Petitioners filed a "Motion To Strike Certain Allegations Of The Complaint" (Jt. App. 19-23). The matter was thereafter briefed, and an order denying the Motion was entered on October 8, 1970 (Jt. App. 25-26).

On November 17, 1970 Petitioners filed a "Motion For Reconsideration Or, In The Alternative, Certification Pursuant To 28 U.S.C. §1292(b)" (Jt. App. 83-85). Petitioners also submitted an Affidavit of Donald E. Sveen, to which was attached an alleged copy of the security purportedly sold to the Respondent (Jt. App. 86-87).

Respondent raised immediate and specific objections, also filed on November 17, 1970, in his "Response To Motion For Reconsideration" (Jt. App. 88-89), wherein he objected to a copy of the alleged note on the ground that it constituted new matter and was presented for the first time on that day, which presentation is inappropriate unless the opposing party has an opportunity to respond, and also on the ground that the note was not relevant to the matters put into dispute by the Motion To Strike.

On November 18, 1970 the Trial Judge entered a Finding Of Fact (Jt. App. 90) and an Amended Order (amending his order of October 8, 1970) to permit Petitioners to seek an interlocutory appeal (Jt. App. 96-98).

The Amended Order (Jt. App. 96-98) upon which Petitioners' appeal was grounded makes absolutely no reference to the Affidavit of Donald E. Sveen (Jt. App. 86-87) which is the only record support for the characterization of "commercial paper" as a "conventional promissory note with a maturity of nine months or less." In fact, that Affidavit was presented on November 6, 1970, approximately six months after Nuveen's original Motion To Strike was filed on May 18, 1970. It is obvious that this matter was not before the Court when the Motion To Strike was under consideration, and when the order denying that motion was first entered on October 8, 1970 (Jt. App. 24-26).

The true factual posture of the case, on the question of the Court's ruling on the Motion To Strike, is that Petitioners (Nuveen) never bothered to acquaint Respondent (Sanders) or the Court with the actual security which had been sold until a full ten months after the sale on January 29, 1970 (Jt. App. 9). It is extremely relevant to the issues in this case that private investors *do not see or possess* the "commercial paper" at any time. The private investor, rather, must rely completely on his broker-dealer.

ARGUMENT.

I. THE NATURE OF THE TRANSACTION.

On or about January 29th, 1970, the Petitioners caused to be offered and sold to the Respondent a security referred to as short-term commercial paper, being a $35,000 obligation of Winter & Hirsch at 8 5/8%, dated January 30, 1970 and due April 30 1970, of which Petitioners (Nuveen) was the owner. The security was not delivered to the Respondent but he received a confirmation of the transaction in due course.

The Respondent contends that such security was sold to him under circumstances violative of the anti-fraud provisions of the Securities Act of 1933 and of the Securities Exchange Act of 1934, as well as of Sections 2, 18 and 27 of Article III of the Rules of Fair Practice of the National Association of Securities Dealers. The Respondent also contends he is a member of a class of persons similarly situated.

It is the Respondent's position that jurisdiction is based upon Section 27 with respect to the Securities Exchange Act of 1934, and that the Petitioners violated Sections 10(b) and 20 of that Act, and Rule 10b-5 promulgated thereunder, in the offer and sale of the Winter & Hirsch paper to him. The Trial Court denied the Petitioners' motion to dismiss the Complaint which motion was posited on, among other things, the contention that the Respondent had no cause of action under the Securities Exchange Act of 1934. That contention was based upon the theory

that the form of paper sold the Respondent was not a "security" as that term is defined in the Securities Exchange Act of 1934 (Section 3(a)(10), 15 U.S.C. Section 78(c)(a)(10)). The Court of Appeals affirmed that decision without dissent.

It appears that the Petitioners no longer contend that the paper sold to the Respondent is not a security, but only that it is not a security cognizable under the Securities Exchange Act of 1934 because of its limited maturity. Petitioners have clearly admitted in their Brief that the anti-fraud provisions of the federal securities acts apply with full force to commercial paper of longer than nine months duration. The only question remaining is whether the shorter duration exempts or removes this broker-dealer from observance of the anti-fraud provisions of the Securities Exchange Act of 1934.

As noted above, the Petitioners now characterize the security sold to the Respondent as a "conventional promissory note". This characterization is apparently in aid of suggesting that the transaction was something other than the purchase of a security by a customer from a registered broker-dealer acting as principal in the Over-The-Counter securities market. This transaction, like many others for other types of securities between a broker and its customer, was a transaction accomplished in the O.T.C. market; the Respondent had no contact or dealings with the issuer of the securities; the issuer's commercial paper was trading in the market and Nuveen owned an unknown position, a portion of which was purchased by Respondent (Sanders) in reliance upon representations and omissions of an agent of Petitioners (Nuveen). The evidence of the transaction was not the

physical security, which was never delivered to Sanders, but a standard form of confirmation.

The fact that a customer ordinarily does not, and, in fact could not examine a security so purchased in the market without the utmost complication and difficulty, reinforces the element of reliance placed upon the broker-dealer with respect to such transactions. This element is, of course, the touchstone of the Securities Act of 1933, the Securities Exchange Act of 1934 and all of the other acts designed to protect investors from misplaced reliance.

II. THE COURT OF APPEALS IS CORRECT IN BASING ITS DECISION UPON THE RELATIONSHIP AMONG THE SIX BASIC FEDERAL SECURITIES ACTS.

Beginning with the premise that federal securities legislation was enacted for the purpose of avoiding frauds and therefore that the legislation is not to be technically and restrictively construed, but with flexibility to effectuate its remedial purposes, the Court of Appeals examined the six basic federal securities acts. The Court of Appeals noted that the Securities Exchange Act of 1934 was the only Act among the six acts to withdraw short-term commercial paper from the anti-fraud provisions thereof, while the same paper would be subject to the anti-fraud provisions of each of the other acts.

Following the direction indicated by this Court in *SEC* v. *Capital Gains Research, Inc.*, 375 U.S. 180 (1963), *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967), and *Affiliated Ute Citizens* v. *United States*, 40 U.S.L.W. 4448, 31 L. Ed. 2d 741 (1972), among others, the Court of Appeals concluded that Congress intended to protect purchasers

of interests having the attributes of "securities" against fraud under all six Acts, and that the "commercial paper" in this case has those attributes.

In part, the Court of Appeals based its conclusion upon the theory that short-term notes of the type exempted from registration under the 1933 Act by Section 3 (a) (3) are excluded from the definition of a "security" under the 1934 Act, but, *a fortiori*, if such short-term notes are not exempted under Section 3 (a) (3) of the 1933 Act, they are not exempt from the anti-fraud provisions of the 1934 Act despite any limitations on maturity. In this connection, reliance was placed by the Court of Appeals upon the four criteria for the exemption for short-term commercial paper from the registration requirements of the Securities Act of 1933 as set out in SEC Release #33-4412 (1961). Among the requirements consistently stressed in the legislative history of the 1933 Act and by the Securities and Exchange Commission is that requirement which militates against short-term paper being marketed to the public.(*)

The Petitioners are most desirous that this Court place reliance in granting a Writ upon excerpts from a recent *Staff Study* of the SEC. They seek the determination of this Court that the SEC agrees with the Petitioners' theories in this case. The Petitioners fail to point out, however, that the *Staff Study*, where it relates to short-term commercial paper, is referring specifically to that paper issued by Penn Central Transportation Company.

(*) See thorough analysis of legislative history, "The Commercial Paper Market and Securities Acts" 39 *University of Chicago Law Review* 362, 381 ff. (1972).

In his Letter of Transmittal, Commissioner Casey clearly indicates that whether or not the commercial paper issued by the Transportation Company was exempt under Section 3 (a) (3) of the Securities Act of 1933, it would have been exempt under Section 3 (a) (6) of that Act since that exemption applies to "any security issued by a *common or contract carrier,* the issuance of which is subject to the provisions of Section 20 (a) of the Interstate Commerce Act, as amended", without regard to whether it was used for current transactions or whether its maturity was more than nine months. *Securities and Exchange Commission Staff Study of the Financial Collapse of the Penn Central Company,* File No. HO-482 (1972) (italics ours).

III. THE CASES USED BY THE PETITIONER ARE SIMPLY INAPPOSITE TO THE FACTS OF THIS CASE.

The Petitioners have used several cases from the United States Court of Appeals for the Second Circuit as authority in their Petition. They also claim that there is a division of opinion among the Courts of Appeal. Such a conclusion is incorrect. The cases from the Second Circuit have a totally different factual posture from this case. The Petitioners fail to note the very basic distinction that the commercial paper sold to the Respondent in this case was part of a distribution to the investing *public,* of which he was a member. The factual posture of the cases before the Second Circuit was completely different. The use of those cases by the Petitioners is simply inapposite to the facts of the present case.

The open-market nature of the transaction in this case specifically distinguishes this matter from the cases cited

by the Petitioners. In those cases the instruments in question were most substantial in amount and essentially singular in number. Most important, the notes in those cases may be said to have been issued for self-dealing purposes since they were issued and negotiated within single or closely related corporate structures; it is obvious that they were not issued for the purpose of distribution to the public. Based upon the record before it in this action, the Court of Appeals noted that the commercial paper purchased by the Respondent was placed through the Petitioners, John Nuveen & Co., and bought by at least forty-two purchasers, including the Respondent, in an aggregate face amount of $1,661,500.00. (Appendix A; cf. Jt. App. 31-32).

In alleging that the decision of the Court of Appeals for the Seventh Circuit is in direct conflict with the decisions in the Second Circuit, the Petitioners specifically cite *Superintendent of Insurance of the State of New York* v. *Banker's Life and Casualty Company*. This citation is astonishing in the light of the decision of this Court in that case at 404 U.S. 6, where the Court spoke as follows:

> "The Congress made clear the 'disregard of trust relationships by those whom the law should regard as fiduciaries, are all a single seamless web' along with manipulation, investor's ignorance, and the like. H. R. Rep. No. 1383, 73d Cong., 2d Sess., p. 6. Since practices 'constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers' in the regulatory agency 'have been found practically essential.' *Id.*, at 7. Hence we do not read §10(b) as narrowly as the Court of Appeals; it is not 'limited

to preserving the integrity of the securities markets' (430 F. 2d, at 361), though that purpose is included. Section 10(b) must be read flexibly, not technically and restrictively. Since there was a 'sale' of a security and since fraud was used 'in connection with' it, there is redress under §10(b), whatever might be available as a remedy under state law."

As determined by this Court in that case, transactions involving United States Treasury Bonds come within the protection of Section 10 (b) of the Securities Exchange Act of 1934 (the anti-fraud provisions). Treasuries are specifically exempt from the registration requirements of the Securities Act of 1933 under Section 3 (a) (2) and are defined as "exempted securities" under Section 3 (a) (12) of the Securities Exchange Act of 1934. Therefore, the similarities between treasuries and commercial paper is patent. However, despite the exemptive provisions pertaining to treasury bonds under both acts, this Court found that the transactions therein brought those transactions within the purview of the anti-fraud provisions of the 1934 Act.

IV. THE COURT OF APPEALS CORRECTLY APPLIED THE DECISIONS OF THIS COURT TO THE FACTS OF THIS CASE AND DECIDED THE CASE IN CONFORMITY WITH THE DIRECTIONS CONTAINED IN THOSE DECISIONS.

The decisions of this Court which are used as authority in the Opinion of the United States Court of Appeals for the Seventh Circuit spell out a consistent judicial policy. Without unduly lengthening this Brief by citation to each of those cases, that policy is a direction to construe the Federal Securities Acts broadly in order to

effectuate the remedial purposes for which they were passed. This Court has consistently recognized that the economic realities of a particular fact situation should prevail. The Court of Appeals has carefully applied the decisions of this Court and followed the directions contained in those decisions to reach a result which is grounded in economic reality.

CONCLUSION.

For the reasons stated above, Respondent urges this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

pen market paper:
Placed through John Nuveen & Co.:

r. Lawrence W. Morley	7738 Victoria, Chicago, Illinois 60631
erald R. Tapp	700 South Hamlin, Park Ridge, Illinois 60068
r. Frank G. Raphael	490 Renaud Road, Grosse Pointe Woods, Michigan 48236
ugene E. Johnson & Clifford M. Johnson as Trustee for Thora M. Johnson	735 Deerfied Road, Deerfield, Illinois 60015
tovall & Stovall, Inc.	141 W. Jackson Blvd., Suite 1470, Chicago, Ill Attention: Robert Stovall, President
arl T. Nelson, Jr.	459 West Fremont St., Elmhurst, Illinois 60126
r. Robert Abram	Route 1, Hubbard Lake, Michigan 49747
rs. Elizabeth Sorenson	76 Brewster Lane, La Grange Park, Ill., 60525
rinity Grace United Methodist Church	1211 Vassar Avenue, South Bend, Indiana46628 Attention: Robert Kuehl, Treasurer
.R.F. Corporation	613 National Bank Bldg., South Bend, Ind., 46601 Attention: Robert Kuehl
itizens State Bank	5001 Excelsior Blvd., St. Louis Park, Minnesota 55416 Attention: Mr. B. Johnson, Exec. Vice President
. C. Smiley and Associates	1021 LaSalle Ave., Minneapolis, Minnesota 55403 Attention: S. C. Smiley, President
armony State Bank	Harmony, Minnesota 55939 Attention: Leonard D. Skaalen, President
hicago-Lake State Bank	825 East Lake, Minneapolis, Minnesota 55407 Attention: Gordon Burwell, Exec. Vice President
enver National Bank	P. O. Box 97, Denver, Pennsylvania 17517 Attention: Richard B. Heisey, Cashier
r. Dimmy Andrews	700 Cumberland, Park Ridge, Illinois 60068

National Stock Yards National Bank	Exchange Bldg., National Stock Yards, Illinois 62705 Attention: Virgil B. Sorrells, Vice President
Capital Bank of Springfield	P. O. Box 1209, Springfield, Illinois 62705 Attention: Warren L. Martin, Exec. Vice President
Midland Community Bank	100 East Main St., Kincaid, Illinois 62540 Attention: Willis E. Parley, Cashier
Greenview Community Bank	106 Washington, Greenview, Illinois 62642 Attention: Donald Hicks
Citizens Bank & Trust Company	One Northwest Highway, Park Ridge, Illinois 60068 Attention: William M. Frew, President
Hogan & Farwell, Inc.	141 W. Jackson Blvd., Chicago, Illinois 60604 Attention: D. M. DeEmo, Controller
Mrs. Katherine E. Doolittle	Merrymeeting Farm, Lincolnville, Maine
Mrs. Frieda Wallner c/o Mrs. O. Keith Smith	4118 Woodland, Western Springs, Illinois 60558
D.E.E. Profit Sharing Plan	Down East Magazine, Camden, Maine 04843
Down East Enterprise, Inc.	Bayview Street, Camden, Maine 04843
Lawrenceville National Bank & Trust Co.	Box 597, Lawrenceville, Illinois Attention: Charles W. Crackel, Cashier
Mrs. Charlotte Somerfield	3028 Pemberton, Toledo, Ohio
M. K. Clark Co.	2717 Olive Street, St. Louis, Missouri 63103
John Nuveen & Co. (Inc.)	209 S. LaSalle Street, Chicago, Illinois 60604 Attention: James T. Stewart
Angela Raphael & Dorothea R. Coffin	7877 Hartwell, Dearborn, Michigan
Jackson National Life Insurance Company	1516 Clinton Road, Jackson, Michigan Attention: Larry Baldinger, Vice President
Phyllis and Julian K. Shapiro	9037 North Kenton Road, Skokie, Ill., 60076
Elgin National Watch Employees Relief Fund	Elgin, Illinois 61020
Calumet-Dutch Packing Co.	607 North 8th Street, Sheboygan, Wisconsin 53081

Rabbi Schlomoh Fineberg	Winston Towers #2, 6833 N. Kedzie, Chicago Illinois
Kuehl Brothers	606 Tower Bldg., South Bend, Indiana 46601 Attention: Robert Kuehl
Second Boulevard Realty & Insurance Co.	790 Renaud Road., Grosse Pointe Woods, Michigan 48236
Mr. H. Sanders	135 S. LaSalle St., Chicago, Illinois 6060
Mr. Russell Kuehl	606 Tower Bld., South Bend, Indiana 46601
Jennie M. Clark	2623 Southridge Drive, South Bend, Indiana 46614
Mr. Harry Bass	8801 Golf Road, Des Plaines, Illinois 6001
Citizens State Bank	Montgomery, Minnesota 56069 Attention: Lyle Stotesbery, President
La Crescent State Bank	La Crescent, Minnesota 55947 Attention: Denis Stotesbery